## OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1013

ROBERT E. PHILLIPS, Individually and on Behalf of Each and All Others Similarly Situated, ET AL., *Appellants*

v.

E. T. KLASSEN, Individually and in His Official Capacity as Postmaster General of the United States Postal Service, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided May 10, 1974

*William R. Duff*, with whom *Ivan Frank Kardos* were on the brief, for appellants.

*Eugene B. Granof*, Attorney United States Postal Service, of the bar of the United States District Court for the District of Columbia, *pro hac vice* by special leave of court, with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, *John A. Terry, Derek I. Meier* and *N. Richard Janis*, Assistant United States Attorneys, were on the brief, for appellees. *Earl J. Silbert*, United States Attorney and *Gregory C. Brady*, Assistant United States Attorney also entered appearances for appellees.

Before LEVENTHAL, MACKINNON and WILKEY, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* Appellants are former employees of the United States Post Office Department, reorganized in July, 1971, as the United States Postal Service. They accepted offers to resign with retirement benefits and an additional bonus equal to six months pay rather than

face the prospect of separation from the Department as part of a reduction in force attendant to the reorganization of the agency. Suing for themselves and on behalf of those similarly situated,[1] they brought an action in District Court seeking a declaration that their retirements were void; they also sought reinstatement with back pay, alleging that under the circumstances their resignations were coerced as a matter of law. The District Court denied plaintiffs' motion for certification as a class action and dismissed the action against all but one of the named plaintiffs, against whom it granted defendants' motion for summary judgment. We affirm.

## I. The Early Retirement Offer

On August 12, 1970, Congress passed the Postal Reorganization Act in an effort to upgrade the nation's postal service. The Act replaced the Post Office Department with the United States Postal Service, an "independent establishment of the executive branch of the Government of the United States. . . ." 39 U.S.C. § 201.

The Act was a congressional mandate for reconstruction of the Department and reform of its operations. As part of its task, the new Postal Service sought to streamline its operations and eliminate nonessential departments and personnel. On January 18, 1971, the Acting Assistant Postmaster General, Bureau of Personnel, put the postal staff on notice, in a Memo To All Headquarters Employees,

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[1] Named as representative plaintiffs were five individuals, each representing an age and years-of-service category eligible for the early retirement offer. Robert R. Phillips represented the 55 years old/30 years of service category; Mary A. Karwoski represented the 60 years old/20 years of service category; Ira Greinsky represented the 25 years of service category; Ann Putney Flory represented the 50 years old/20 years of service category; and Birger F. Burman represented the 62 years old/5 years of service category. (JA 1-5).

that personnel changes would attend the advent of the new Postal Service, "and those changes may vary from personnel transfers to reduction in grade to job abolishments, or reduction in force." (JA 14). This announcement was followed by several months of rumors of large-scale reorganization and a reduction in force, but no further hard information was forthcoming until the middle of May.

On May 12, 1971, the Postmaster General, in a Memorandum To Headquarters and Regional Employees (JA 17), announced the reorganization of the Headquarters and Regional management structure of the Postal Service. Postal regions were reduced from fifteen to five, and authority was decentralized. Anticipating major personnel changes, the Postmaster General announced a liberalization of retirement policies coupled with an offer of a bonus equal to six months' salary to those employees who resigned between May 16 and June 15. Additional details were supplied by another Memorandum, issued by the Postmaster General the following day. (JA 20).

Normally, a federal employee is entitled to retire with an annuity only if 55 years of age with 30 years of service, or 60 years of age with 20 years of service, or 62 years of age with five years of service. 5 U.S.C. § 8336. Section 8336(d) also provides, however, that:

> An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

For a number of years, the Civil Service Commission interpreted the statute to mean that resignations submitted upon request in contemplation of a reduction in force constituted "involuntary" resignations, within the scope of § 8336(d). This view was for some time applied with

relative informality,[2] but for the three year period between December 10, 1969 and December 8, 1972, this construction of the law was set forth in a published ruling.[3] The Commission stated that the purpose of the interpretation was "to lighten the impact of current and future reductions in force." (JA 29) (emphasis omitted). This came about by virtue of the fact that some annuity, albeit less than that given those retiring after full service, was made available to those who resigned in contemplation of a reduction in force. However, the Commission emphasized that "this procedure is not to be used as a device for coercing employees to give up their retention rights" and outlined certain procedural safeguards.

In his Memorandum To Headquarters and Regional Employees, issued May 13, 1971, the Postmaster General invoked the procedures authorized by FPM Letter No. 831-23 (*supra*, note 3), and requested "any eligible employee who may desire to retire to submit his resignation in response to this letter." (JA 105a). In addition, employees who resigned were to receive a bonus equal to six months' pay, payable on January 1, 1972. These benefits were available only for those employees who retired between May 16 and June 15, 1971.[4] Employees retiring thereafter, or those who were separated as part of a reduction in force, would not receive annuities or bonuses. The Postmaster Gen-

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[2] Before 1969, the "resignation requested" procedure had on occasion been employed, "usually in cases of high-level policy-making positions following a change of administration." FPM Letter No. 831-23, December 10, 1969. (JA 29).

[3] Federal Personnel Manual Letter No. 831-23. This was later codified as Federal Personnel Manual Supplement 831-1, Subchapter S11-(d)(2). It was rescinded by the Commission as of January 1, 1973, by FPM Letter No. 831-32. (JA 223a).

[4] The Postal Service bonus offer was in addition to the 4.5 percent cost-of-living increase approved by the Civil Service Commission for all civil service employees who retired before May 31, 1971. To get both, postal employees had to retire before May 31.

eral's Memorandum stated that "this letter is not intended to coerce eligible employees to resign and forfeit their retention rights, but is simply an extension of the normal retirement opportunities available to employees." (JA 105b).

By June 15, 1971, 1,884 of the 2,740 postal employees eligible for the bonus and for retirement under the liberalized requirements had retired. Included in this group were the five named plaintiffs in this action. Of the five, only appellant Ira S. Greinsky sought administrative review of the action of the Post Office Department before bringing this action. On June 9, 1971, ten days after his retirement, Mr. Greinsky wrote to the New York Regional Office of the Civil Service Commission complaining that he was coerced into retiring. To support his claim, Greinsky relied not only on the alleged impropriety of the retirement scheme of the Post Office Department, but also on representations made to him by his superiors that his job was to be abolished. (JA 49).

By letter of June 29, 1971, the Appeals Examiner rejected Greinsky's complaint. Greinsky appealed this decision to the Civil Service Commission's Board of Appeals and Review, repeating his earlier allegations and adding contentions of deception and vindictiveness on the part of his superiors. (JA 54-55). This Board's decision of October 18, 1971, denied relief to Greinsky. (JA 31-34).

## II. The Class Action

Plaintiffs allege that they represent a class "composed of more than 1,500 former employees of the United States Post Office Department who were coerced into premature retirement . . ." This definition of the class presupposes a favorable ruling on the very issue raised by the complaint: were the 1,884 postal employees who retired pursuant to these offers invalidly "coerced"?

It is axiomatic that in order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit and as contemporary as the requirement of Rule 23(a)(4) of the Federal Rules of Civil Procedure that "the representative parties will fairly and adequately protect the interests of the class."

In the words of Justice Stone, well known as a student and teacher of Equity: "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. * * * In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

Class members whose interests are antagonistic in fact to, or even "potentially conflicting" with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process, to an adjudication taken in their name. Hansberry v. Lee, *supra*. Where courts discern that the interests of the named plaintiffs are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action.[5]

A more difficult question is raised when defendant's action is one that may be characterized as injurious by only part of the affected group. In such a situation, the question arises whether the parties to the action in fact

[5] See, *e.g.*, Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

represent the interests of those affected. In Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969), plaintiff employees brought suit to contest management's construction of the terms of a pension plan that was amenable to at least three different interpretations. The opinion by Judge Aldrich for the court noted (p. 456):

> In order to maintain a class suit plaintiffs must be truly representational [citing Carroll v. American Federation of Musicians, 2 Cir. 1967, 372 F.2d 155, at 162, vacated and remanded on other grounds, 391 U.S. 99.] * * * Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.
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> In the case at bar, while the suing plaintiffs may have been of the opinion that wise management or other factors would cause the fund to grow, others could well have thought that a vested obligation in a fixed amount would be more desirable than to incur investment risks. Under such circumstances the court could not have found that plaintiffs were "typical" of the former Amerotron employees whom they purported to represent; they were typical of only one of two conflicting groups. Under the Rule, and as a matter of due process, plaintiffs could not represent both groups.[6]

In the case before us, challenged action of the Post Office Department was probably received quite differently by different employees. Nearly two thousand postal workers resigned. In all likelihood, some were employees who un-

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[6] See also City of Chicago v. General Motors Corp., 332 F. Supp. 285 (N.D. Ill. 1971), *affirmed*, 467 F.2d 1262 (7th Cir. 1972); Ward v. Luttrell, 292 F. Supp. 162 (E.D.La. 1968). *Cf.* Koen v. Long, 302 F. Supp. 1383 (E.D.Mo. 1969), *affirmed*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

derstood full well that they were to be separated due to the impending reduction in force, and were affirmatively pleased to have the opportunity to resign with retirement benefits and a substantial bonus, pleased that in conjunction with the reorganization Postmaster General Blount had, in his words, "liberalized the retirement policy for Headquarters and Regional employees." There may have been others who did not know for a fact how they would be affected by the reduction in force, but were sufficiently aware of their relative seniority and their evaluation by their superiors to make a relatively informed estimate. To them as well, the offer was probably perceived as an enlightened and humane way for the Department to trim its employment rolls. Doubtless there are a substantial number who perceived the situation in the same way as the plaintiffs in this action: the effect of the reduction in force was unknown, and the benefits offered were too sweet to turn away on a gamble of retention.

If plaintiffs are successful, all of these employees, in each of these categories, will be governed by a ruling that all the resignations, the extension of annuities, and the payment of the bonuses, all are and always were unlawful. Although the complaint is not without ambiguity, a fair reading is that plaintiffs intend this to be a class action in behalf of all former Post Office employees who retired between May 16, 1971 and June 15, 1971,[7] in response to

[7] The allegations of the complaint recite that plaintiffs bring the action in behalf of all employees who "were removed from the Department between May 16, 1971 and June 15, 1971, inclusive, and who would not otherwise have been removed or voluntarily retired between those dates." (Par. 3, 5, 7, 9, 11). The allegation to support a class action recites that the members of the various sub-classes (*supra*, note 1) comprise over 1,500 former Post Office employees, and the motion for certification of a class action begins with the allegation that plaintiffs, constituting over 1,500 former Post Office Department employees, are so numerous that joinder of all members of the class is impracticable.

the suggestion of the Postmaster General. When, as here, there is complaint as to injury from an allegedly invalid action of a Government official and the action may be taken as conferring economic benefits or working economic harm, depending on the circumstances of the individual, the foundations of maintenance of a class action are undermined. In view of the likelihood that there will be divergent views among the employees who pursued the voluntary retirement route, as to whether they have been injured or benefited we cannot say the District Court erred in concluding that plaintiffs cannot fairly maintain the action they have brought in behalf of the more than 1,500 former employees.[8]

The problems we have identified cannot be avoided merely by saying that it is always open to members of a class to "opt out" of any relief to which they are held entitled. One point is that some members of the class may not be entitled to the same relief as others in any event. Can reinstatement be ordered as to employees who are now disabled—perhaps due to conditions arising in other employment? Moreover, as to some employees who took advantage of the retirement offer, questions of estoppel might arise. Without deciding these questions, we point out the dangers of their being buried in the catch-all of the class action. Perhaps even more important is the possibility

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[8] Compare Hansberry v. Lee, *supra*, 311 U.S. at 44:

> [It] is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. * * *
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> Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class.

that the theory now proferred in the class action would expose some members of the retired class to a legal liability, to return the bonus, they are not in a factual position to shoulder.

The issue of defining the class, and its proper representation, may arise in some measure in all class actions, but it is not likely to cut as keenly when only future relief is sought, for even an action by one person, or a smaller class, may result in a judgment that has the same impact on the future as a declaratory judgment in a class action. But here there is the added difficulty that the action is one that would trigger affirmative relief, with both monetary consequences and an unscrambling of employment rolls.

Plaintiffs seek certification of their class under Rule 23 (b)(3) of the Federal Rules of Procedure, which requires that the court must conclude that proceeding as a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." In our view, there are strong considerations why that finding was not made, either in support of the "class" as designated by plaintiffs, or in support of a judicial redefinition of the class in terms of subclasses, *see* Rule 23(c). The instant action asks the court to invalidate steps taken as part of a massive reconstitution of the nation's postal services. The problem of relief would be formidable if rights were proclaimed on a "class" basis, especially if reinstatement were a legal right, as claimed.[9] Corollary to reinstatement would be the problem of defining the rights of current employees of the Postal Service.

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[9] The problems of individual reinstatement were recently noted by the Supreme Court in Sampson v. Murray, 42 U.S.L.W. 4221, 4225 (U.S. February 19, 1974). If reinstatement of the individual carries with it "attendant tension," reinstatement of hundreds carries the potential of tension multiplied to electrifying proportions.

## III. Exhaustion of Administrative Remedies

The foregoing comments provide a context for our ruling that the lawsuit must not only fail as a class action but also, whether viewed as a class action or individual actions, must fail for another reason—the failure to exhaust administrative remedies.

There was no appeal to the Civil Service Commission by any member of the plaintiffs' alleged class except by Greinsky, and his appeal, as we shall see, was grounded not on the injury now alleged as to all members of the class, that the general presentations of the Postmaster General were, in effect, coercive per se, but rather in the claim that Greinsky was coerced by the particular representations made to him.

It is a basic principle of judicial review of administrative determinations that the courts are open only to those who have exhausted available administrative remedies. Numerous decisions of the Supreme Court [10] and of this court [11] so hold. The vitality of the rule is underscored by its recent application by the Supreme Court in Sampson v. Murray, 42 U.S.L.W. 4221 (U.S. February 19, 1974), to a suit by a government employee, protesting an allegedly invalid discharge, who was willing to pursue her appeal to the Civil Service Commission but sought temporary judicial maintenance of the status quo while that remedy was exhausted. The requirement of recourse in the first instance to the administrative processes of the Civil Service Commission is fully applicable to cases in which government employees allege that seemingly voluntary resigna-

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[10] See, *e.g.*, F.C.C. v. Schreiber, 381 U.S. 279, 296-97 (1969); Reisman v. Caplin, 375 U.S. 440 (1963); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

[11] See, *e.g.*, Brawner Bldg., Inc. v. Shehyn, 143 U.S.App.D.C. 125, 442 F.2d 847 (1971); Spanish Int'l Broadcasting Co. v. FCC, 128 U.S.App.D.C. 93, 102-04, 385 F.2d 615, 624-26 (1967); Neisloss v. Bush, 110 U.S.App.D.C. 396, 401, 293 F.2d 873, 878 (1961).

tions were in fact coerced, Dabney v. Freeman, 123 U.S. App. D.C. 166, 358 F.2d 533 (1965).

The doctrine requiring exhaustion of administrative remedies applies to class actions as well as individual actions. While there appears to be some divergence in the opinions as to the circumstances under which exhaustion by one member is sufficient to meet the exhaustion condition for the class action,[12] it is generally agreed that exhaustion by at least one member of the class is a necessary prerequisite for a class action.[13] Where not even one member of the class has either pursued an administrative remedy or shown why one of the exceptions to the exhaustion rule is applicable, there is a barrier, absent unusual circumstances, to the class action.

In the case at bar, the court's obligation to insist on the exhaustion doctrine is underscored by plaintiffs' effort to upset administrative actions on a broad basis and to embroil the courts in a sweeping ouster and reinstatement program. Plaintiffs' course would deprive the courts of the benefit of the guidance and mechanisms of the Civil Service Commission. If the position advanced by plaintiffs is sound, its timely presentation to the Civil Service Commission might have generated corrective relief that would have avoided hardships that would be attendant upon a court decree at this date. The courts of equity, where class

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[12] *Compare* Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Co., 304 F. Supp. 1284 (N.D. Indiana 1969) (exhaustion not prerequisite to grant of affirmative relief where one member of class has exhausted his remedies) *with* Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D.Ind. 1967) (only prohibitory injunction or declaratory judgment available for members of class who have not exhausted administrative remedies despite exhaustion by named plaintiff).

[13] See, *e.g.*, Barela v. United Nuclear Corporation, 462 F.2d 149 (10th Cir. 1972); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

actions are brought, must give consideration to the public interest and inconvenience in determining whether relief should be extended beyond or left short of the relief that would be available in a purely private action. Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 552 (1937). Moreover, timely appeals to the Civil Service Commission might well have brought to the fore the various subclasses, whose indeterminate nature pulls away from maintenance of the present action on a class basis, and have identified differences in interest, in legal positions, and in available relief, all of which could have been considered by the court in a final ruling on the class suit issues.

Appellants rely on the exception that exhaustion is not required when it is certain that established administrative procedures would prove unavailing.[14] Greinsky's appeal, it is argued, was a signal that the Civil Service Commission would not grant relief for resignations taken in response to the Postmaster General's memos of May 12 and 13, for it established the Commission's view that the general representations by the Postmaster General were not coercive as a matter of law. As we have already noted, however, Griensky's appeal was not grounded on the alleged coercion of the general representations made at the highest levels of the Post Office, but was focused on the coercive impact of the particular representation made to

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[14] In Allison v. United States, 451 F.2d 1035 (Ct.Cl. 1971), relied on by plaintiffs, some of the 15 plaintiffs had sought administrative action. The Civil Service Commission, taking the complaints together, ruled that no relief was available as a matter of law. In contrast, Greinsky's appeal was taken by him alone, and its resolution did not purport to decide the question of the coerciveness of the Postmaster's early retirement offer as a matter of law.

Appellants also rely on Farrell v. Gardner, 279 F. Supp. 427 (E.D.Pa. 1968); but in that case the court held that plaintiff was unaware of the existence of administrative remedies and further found that those remedies clearly would have been unavailing. Neither condition obtains in the present case.

him by his immediate superiors, who had allegedly colluded to insure its coercive effect.[15] Moreover, at no time did Griensky assert that the offer of the Postmaster General was without statutory authority. Since the issue was not before the Commission, its ruling could not in any sense be taken as a considered holding on the contention presented in the complaint.

Taking the complaint as filed by appellants Phillips, Karwoski, Flory and Burman as individuals, and passing by the class action allegations, these claims must likewise be dismissed for failure to exhaust administrative remedies. We add to what has already been said that these individuals might have obtained relief from the Commission even assuming it was or would have been of the view that the early retirement option was not of itself coercive, for this would not have precluded the Commission from finding that it did serve to coerce employees of modest experience, responsibility and sophistication.

## IV. Greinsky's Claim

To the extent that Greinsky's claim as an individual reflects a recourse to administrative remedies, summary judgment for dismissing his claim with prejudice was appropriate.

Greinsky makes no allegation that he did not fully understand the terms of the Post Office's offer to extend retire-

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[15] In Greinsky's affidavit in support of plaintiffs' motion for summary judgment (JA 181), Greinsky described the pressure to resign this way:

> When I retired in May, 1971 my decision to do so was not freely made but rather made because I had no other real alternative. I had to take the bonus and retire because at least then I would have provided some security for my family, whereas, had I remained and been R.I.F.ed, *as I was assured would happen,* I would have lost the bonus. (emphasis added.)

ment benefits to those who resigned voluntarily. He signed a statement on May 31, 1971, that he had "acceded to the Postmaster General's request and have of my own volition foregone any retention rights under reduction in force regulations." (JA 107). He was an employee who had both long tenure, 27 years of service, and a position of responsibility.[16] The sole evidence in the record that the resignation was not voluntary is Greinsky's after-the-fact assertion to that effect.

The issue for the court is whether there is "evidence of substance in that record which supports the [Civil Service] Commission's view of the matter." Dabney v. Freeman, *supra*, 123 U.S. App. D.C. at 168, 358 F.2d at 535. The Commission's finding that Greinsky's resignation was not coerced by particular representations made to him is supported by substantial evidence.

*Affirmed.*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-72

ROBERT R. PHILLIPS, et al., *Plaintiffs*,

v.

E. T. KLASSEN, et al., *Defendants*.

**ORDER**

Upon consideration of defendants' motion to dismiss or for summary judgment, the memorandum of points and authorities and exhibits filed in support thereof, and of the entire record herein, it is by the Court this 6th day of October, 1972,

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[16] At the time of his resignation, Greinsky was Manager of the Training Section of the New York Regional Office.

ORDERED that plaintiffs' motion for certification of class action is denied; and it is further

ORDERED that this action be and it hereby is dismissed with respect to plaintiffs Phillips, Flory, Karwoski, and Burman; and it is further

ORDERED that with respect to plaintiff Greinsky, defendants' motion for summary judgment be and it hereby is granted.

/s/ J. H. PRATT
*United States District Judge*

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UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D. C. 20415

**DECISION**

IN THE MATTER OF IRA S. GREINSKY

TYPE CASE: *Alleged Adverse Action (Resignation)*

INTRODUCTION

Mr. Ira S. Greinsky submitted an appeal to the Board of Appeals and Review from a decision issued on June 29, 1971, by the Civil Service Commission's New York Regional Office, which found that Mr. Greinsky's separation from the New York Regional Office of the Post Office Department was a voluntary act of resignation and that his appeal therefrom was unacceptable for adjudication.

STATEMENT OF THE CASE

Mr. Greinsky was employed in the position of Manager, Training Section, PFS-Level 16, with the New York Regional Office of the Post Office Department. He resigned his position, effective May 31, 1971. By letter of June 8, 1971, to the Commission's New York Regional Office he expressed a desire to appeal a reduction in force action

which resulted in his involuntary retirement from the Postal Service. He alleged that he was coerced into retiring, that the prepared statement that he was given to sign was not of his own volition; that he was never given complete information as to his retention rights under the reduction-in-force regulations; and that he was not given sufficient notice. In a subsequent letter to the Commission's New York Region he stated that on April 26, 1971, he was advised by the Deputy Regional Director (Services) and the Regional Director of the Postal Service on two separate occasions that his position was being abolished; that on May 12, 1971, he and other employees of the Postal Service, New York Regional Office, were advised of the impending reorganization, and that artificial time limits were set which forced employees to make decisions without being advised as to the alternatives.

Additional argument and representations advanced by Mr. Greinsky in his letter of appeal to the Board are generally the same as those presented to the Region. To further support his claim of coercion and deception he called attention to his appeal to the Assistant Postmaster General from a decision issued on July 21, 1970, by the New York Regional Director of the Postal Service to demote him from the position of Manager, Training Section, PFS-16, to a position at level PFS-15. He stated that in spite of the Regional Director's promise to withhold action pending his appeal with the Assistant Postmaster General, he was removed from his position and assigned other duties, and even after the Assistant Postmaster General found the charges not sustained he (Mr. Greinsky) was told he could not assume his position because his job was going to be abolished and there was no place for him. He maintained that he was deceived and coerced into retiring by being deprived of his normal position, by being given false information; by the use of incorrect procedures in preparation of the retention register, and by withholding information favorable to his prospects.

ANALYSIS AND FINDING

The Board of Appeals and Review has fully considered the case record which shows that the circumstances which led to Mr. Greinsky's separation on May 31, 1971, do not establish, in the judgment of the Board, that force, duress, deception or any other form of improper action was employed by the agency to obtain his resignation. The facts establish that on May 13, 1971, the Postmaster General conducted a national teleconference at which time he outlined the liberalization of the retirement policy to minimize the personnel impact of reduction in force in the Post Office Department as a result of the impending reorganization. All management employees, including Mr. Greinsky, were in attendance. Subsequent to the conference, Mr. Greinsky and other employees were furnished a copy of the Postmaster General's memorandum of May 13, 1971, to Headquarters and Regional Employees, which requested eligible employees who may desire to retire to submit their resignation in response to the letter. The memorandum specifically stated that the letter was not intended to coerce eligible employees to resign and forfeit their retention rights but was simply an extension of the normal retirement opportunities available to employees. Employees were also furnished a memorandum on retirement eligibility requirements, an employee resignation form, and a list of questions and answers.

Contrary to Mr. Greinsky's claim that he was coerced into submitting his resignation, the record indicates that subsequent to the meeting, Mr. Greinsky voluntarily sought information from the Personnel Services Section relative to his annuity and that shortly thereafter he completed and submitted his resignation form to become effective May 31, 1971. The record also indicates that Mr. Greinsky applied for and was granted annual leave from May 21 through May 28, 1971. The general principle is that an action is voluntary if the employee understands the transaction, has

freedom of choice, is given a reasonable time to make his choice, and is permitted to set the effective date.

The previous decision of the Director of the New York Regional Postal Service to demote Mr. Greinsky on a charge of failure to properly supervise, and Mr. Greinsky's subsequent appeal therefrom, have no particular bearing on the voluntariness of his resignation. He states that although the Department's decision in the matter was in his favor he was not permitted to assume the duties of his normal position. He also states that in April 1971, he was advised that his position would be abolished. In either instance, he had an opportunity to choose between alternatives. While the alternative may have been unpleasant to Mr. Greinsky, the Board finds no substantial showing that the alternative he chose—resignation—was forced upon him through deceit or otherwise. Since a voluntary separation is not subject to appellate review by the Civil Service Commission, the Board finds that further consideration of Mr. Greinsky's case is not warranted.

DECISION

The decision of the Commission's New York Region, issued June 29, 1971, is hereby affirmed.

The Commission's regulations provide that the decision of the Board is final and there is no further right of appeal.

For the Commissioners:

/s/ WILLIAM P. BERZAK
*Chairman*

October 18, 1971

## STATUTORY PROVISIONS INVOLVED

**28 U.S.C. Federal Rules of Civil Procedure**

**Rule 23. Class Actions**

*(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

*(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

. . . .

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

. . . .

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

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**5 U.S.C. § 8336 (1970)**

§ 8336. *Immediate retirement*

(a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.

(b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity.

. . . .

(d) An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

(e) An employee who is separated from the service after becoming 62 years of age and completing 5 years of service is entitled to an annuity.

**5 U.S.C. § 8336 (as amended, 1973)**

§ 8336. *Immediate retirement*

. . . .

(d) An employee who is separated from the service—

(1) involuntarily, except by removal for cause on charges of misconduct or delinquency; or

(2) voluntarily, during a period when the agency in which he is employed is undergoing a major reduction in force, as determined by the Commission, and who is serving in such geographic areas as may be designated by the Commission;

after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

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**Federal Personnel Manual Supplement 831-1 (1970)**
**Subchapter S11. Discontinued Service Retirement**

. . . .

d. *Resignation requested*

. . . .

(2) After an agency determines that a reduction in force is necessary, it may, before resorting to the prescribed reduction-in-force procedures or while these procedures are in process, request by letter the resignation of employees in the affected competitive area who meet the age or service requirements, or both, for discontinued service retirement. Separation resulting from a resignation submitted in response to such a request will be considered involuntary for retirement purposes. The purpose of this procedure is to lighten the impact of the reduction in force (i.e., an employee may decide to forego his retention rights and resign, thus enabling the agency to retain an employee who would otherwise be separated). To avoid any implication of coercion, an employee must be fully informed of his retention rights under the reduction-in-force regulations. His

written resignation must specifically state that he is resigning of his own volition at the request of a particular responsible official due to a reduction-in-force situation, and that he was not coerced to forego his retention rights. A copy of each resignation in this category must accompany the retirement application. The individual Retirement Record (Standard Form 2806) in such a case should record the separation as "Resignation—RIF Situation."

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**5 C.F.R. Chapter 1—Civil Service Commission (1973)**
**Part 351—Reduction in Force**

. . . .

SUBPART D—SCOPE OF COMPETITION

§ 351.401 *Determining retention standing.*

Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§ 351.402 *Competitive area.*

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard when it covers a primary subdivision of an agency in the local commuting area. A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

. . . .

§ 351.403 *Competitive level.*

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike

in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by the Commission.

. . . .

§ 351.404 *Retention register.*

(a) Each agency shall establish a separate retention register from the current retention records of employees in, and employees temporarily promoted from, each competitive level affected when a competing employee is to be released from a competitive level under this part.

(b) The agency shall enter on the retention register in the order of his retention standing the name of each competing employee in, and each competing employee temporarily promoted from, a competitive level (whether in duty, leave, or furlough status), except an employee on military duty with a restoration right.

(c) The agency shall enter on a list apart from the retention register the name and expiration date of the appointment or promotion of each employee serving in a position in the competitive level under specifically limited temporary appointment or temporary promotion followed by the name of each employee serving in a position in the competitive level with a performance rating of less than "Satisfactory".